APPEAL NO. 93317

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On March 4, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues announced and agreed upon were:

Did [claimant] suffered (sic) an injury to her left shoulder during the course and scope of her employment with (employer) on (date of injury).

Did [claimant's] alleged (date of injury) injury cause her to unable to obtain and retain employment at wages she earned prior to (date of injury) after 15 May 1991.

The hearing officer determined that the appellant, claimant herein, did not prove she sustained an injury to her left shoulder in the course and scope of her employment on (date of injury), that claimant did not have disability as defined by the 1989 Act after May 15, 1991, and that the carrier has shown claimant's September 7, 1990 shoulder injury "was the sole cause of [claimant's] incapacity after (date of injury) . . . ."

Claimant appealed contending that the hearing officer erred in certain findings of fact and conclusions of law, that claimant "aggravated" her shoulder on (date of injury), and that claimant still has disability. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

This case is about whether claimant's September 1990 compensable injury was sufficiently aggravated by an alleged (date of injury) event to support a claim for benefits under the 1989 Act, and whether claimant had a disability as a result of that aggravation. Much of the testimony and evidence revolves around the meaning of such words as"aggravation," "made worse" and "new injury."

Claimant testified she began work for the employer, in 1988 as a delivery person. As such she was required to unload boxes and packages sometimes weighing between 80 and 90 pounds. On September 7, 1990 claimant testified she was pushing an 89 pound box out of the van when she fell and the box hit her in the left shoulder. Claimant filed an "old law" claim for workers' compensation benefits. Claimant stated she received treatment at a local clinic, saw a (Dr. D), and eventually was seen by (Dr. F). Dr. F took claimant off work and treated her conservatively. Dr. F released her and claimant returned to work with the employer on November 26, 1990. Claimant testified the employer changed her duties and required her to drive a larger truck and to lift heavier boxes than before. Claimant stated she continued to work until (date of injury), although she continued to have some pain and swelling in the shoulder. Claimant testified that on May 14th while unloading some

computer boxes, her shoulder "got tight" and she was unable to move the shoulder, stating that "it got stuck . . . in an upward position . . . ." She finished her shift and went to Dr. F, telling Dr. F her symptoms were similar to ones she had in September 1990. Claimant stated that because she was pregnant Dr. F did not do an MRI. Claimant testified in August 1991 Dr. F told her he was under a lot of pressure from the employer and carrier to release her to return to work and he was doing so even though she was not "100-percent well." Claimant testified she did not go back to work and "that weekend" while she was sweeping and moving an end table at home, her "shoulder got tight on me, real tight all over again." Claimant stated she delivered her baby on January 3, 1992 and two weeks later had an MRI of her left shoulder. Claimant states she understood the MRI showed a torn rotator cuff in her left shoulder. Claimant concedes she gave a recorded statement, with her then attorney on the telephone in a conference call, in March 1992 but she did not understand the questions regarding a new injury pertained to her shoulder and whether that was an aggravation or a new injury. Claimant saw (Dr. G) who, according to claimant, told her she needed surgery on her shoulder. Claimant states Dr. G told her she had "aggravated the shoulder." Claimant settled her September 1990 workers' compensation claim in June 1992, however claimant testified that carrier's attorney told her "I had to settle a 1990 case if I was to see [Dr. G] . . . So, that's what we had to do. I had to settle, because I knew that my job was on the line . . . I had to settle in order to see [Dr. G]." The carrier's attorney who is alleged to have made that statement was present at the hearing as co-counsel, and did not dispute claimant's testimony on this point. Claimant was terminated from her job on July 29, 1992 and has filed suit for wrongful termination. Claimant subsequently had arthroscopic surgery to repair a rotator cuff tear in the left shoulder on August 14, 1992. Claimant states she did not work after (date of injury), because of the injury. On November 15, 1991 claimant was placed on pregnancy leave. Claimant's pregnancy leave ended six weeks after January 3, 1992. Claimant states she has been unable to work since and has not looked for work. Claimant states she has not applied for unemployment and wants to go back to work when she is "100%." Claimant concedes she has training and has worked as a secretary/receptionist but that secretarial positions, even if she could do that work, only paid $6.50 to $7.00 an hour and she was making $13.79 an hour working for the employer.

Claimant's medical evidence consisted of an unsigned report dated 12-28-92 (apparently by Dr. G in that the same portion is part of a complete report in carrier's exhibit), which shows claimant "doing very well" four months after surgery and comments "[i]t appears that the injury of 1990 was the original cause of the problem. Improved somewhat and then returned to work where her shoulder was aggravated leading to increasing pain and the subsequent surgery." Dr. F wrote claimant's attorney a letter dated November 6, 1992, which stated:

> I originally saw the patient in October, 1990 and it appears that her injury was on September 7, 1990. The patient initially responded to conservative treatment but had a recurrence of symptoms in May, 1991 . In the patient's own words,

she had felt she had aggravated her initial injury as the symptoms were the same and she could not recall any new trauma or injury in May, 1991. Her treatment was complicated by the fact that she was pregnant. In spite of her pregnancy, she attempted to return to work in August, 1991 but could not do so because she aggravated the injury to her shoulder at home.

Dr. F essentially reiterated this comment in his letter to carrier dated January 19, 1993 when he stated:

As best as I can tell, and I stated this in a letter to Mr. O, [claimant's] original injury was on September 7, 1990 and I saw her in October, 1990. She became asymptomatic after responding to conservative treatment. She returned to work and then returned to see me in May, 1991. Since there was no injury, it would appear to be (sic) me that she had aggravated her initial injury. I feel she probably did not have a new tear of the rotator cuff but had the original tear from September, 1990. As I stated during our conversation, one cannot be sure because her surgery was not done until August, 1992.

Carrier's medical evidence consists of the same reports claimant provided plus a comprehensive report from Dr. G, dated June 29, 1992, which states:

Present medical history: Injury September 1990. Heavy box fell landing directly on anterior superior aspect of left shoulder. Significant pain which decreased somewhat. Patient released to work and noticed continued pain. No separate injury May, 1991. The injury of September 1990 is the direct cause of the shoulder problems.

A Specific and Subsequent Medical Report (TWCC-64) from Dr. F, dated 03/30/92 states:

WORK STATUS: [Claimant] was given return to work as of 7-25-91 to be effective 8-5-91 which included return to work at full duties. She tried to return to work at light duties, however, none were available and in order to return to work, we gave her a release to return to full duties though I did not release her from my care. When she came back to the office 9-5-91, she stated she had not returned to work because she injured her shoulder over the weekend. I believe this was an aggravation of her underlying condition and does not represent a new injury. I noted she was off work following this injury and would have been evaluated sooner except for her pregnancy. Her pregnancy kept her from being evaluated until after the baby was born.

There were several other TWCC-64s from Dr. F in the file as well as reports from Dr. D relating to the September 1990 injury but nothing which would shed further light on the key

issue of the case. Carrier in his closing statement referred to Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992, and Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992.

The hearing officer found that claimant's September 7, 1990 shoulder injury was the sole cause of claimant's "incapacity" after (date of injury) citing Texas Employer's Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977).

Claimant contends that not enough weight was placed on the claimant's medical evidence, and the fact that claimant worked at her regular duties from November 26, 1990 to (date of injury). Claimant argues the original rotator cuff tear must have been ". . . a small tear or [claimant] could not have returned to her employment." Claimant argues "[i]t is well settled that an aggravation of a pre-existing injury is a new injury."

The hearing officer correctly notes that Page, *supra*, stands for the proposition that ". . . the mere fact that a claimant has a pre-existing injury or disease which enhances or aggravates the injury complained of, does not in itself defeat his right to recover under the statute. (Citations omitted)." The court in that case held, "to defeat the (employee's) claim for compensation because of the pre-existing injury, (the carrier) must show that the prior injury is the sole cause of (the employee's) present incapacity." (We note that the term incapacity was used under the "old law" and is not a term as such under the 1989 Act). We would note, as the hearing officer found under Page, that the burden of proof shifts to the carrier to prove that the prior injury was the sole cause of claimant's present disability. *See also* Texas Workers' Compensation Commission Appeal No. 92681, decided February 3, 1993; Texas Workers' Compensation Commission Appeal Nos. 92654 and 96655, decided January 22, 1992; Texas Workers' Compensation Commission Appeal No. 92534, decided November 13, 1992; Texas Workers' Compensation Commission Appeal No. 92216, decided July 10, 1992; and, Appeal No. 92515, *supra*. While we generally agree with claimant's assertion that as a matter of law a compensable injury embraces an aggravation of a previously existing condition or injury, whether the claimant sustained such an aggravation or merely suffered a continuation of an original injury is a question of fact for the fact finder. *See* Appeal Nos. 92654 and 92655, supra, and Appeal No. 92643, *supra*. In Appeal No. 92643 we upheld the hearing officer's determination that a new injury (aggravation of a preexisting knee injury) was not sustained some three and a half months after the original injury; rather, it was a continuation of the earlier knee problem. *See also* Panola Junior College v. Estate of Thompson, 727 S.W.2d 677 (Tex. App. - Texarkana 1987, writ ref'd n.r.r.); Appeal No. 92656, *supra*; and Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992.

Claimant contends that as proof claimant sustained a new injury is the fact that she returned to work on November 26, 1990 from her September 1990 injury. In Texas Workers' compensation Commission Appeal No. 92643 and 92681, cited previously, we

noted that a return to work does not automatically transfer the original injury into a new injury. That determination remains with the hearing officer, as does the factual determination of claimant's contention that claimant ". . . would not have been able to work all the months that she did if (the rotator cuff tear) had been large."

Carrier in its response cites a number of Appeals Panel decisions as well as case authority for various propositions of law regarding the fact finder, in this situation the hearing officer's, authority to resolve conflicts, weight the credibility of the witnesses, believe all, part or none of any witnesses testimony and that the claimant's testimony only raises an issue of fact and may be believed or disbelieved in whole or in part. We agree that the cited cases constitute the standard of review and do not disagree with the general propositions of law for which they are cited.

Carrier in its closing argument does cite two Appeals Panel decisions which warrant mention. In Texas Workers' Compensation Commission Appeal No. 92518, *supra*, a 75 year old toll booth operator sustained a cut or laceration on his ankle at work. The employee continued work, first treating his wound at home and later seeking medical care. The key issue in that case was that according to the medical evidence, and the employee's own testimony, the original wound never completely healed. Some nine months after the original injury, claimant filed a repetitive trauma injury claim asserting that standing in a toll booth amounted to a repetitive trauma injury under the 1989 Act. A new injury, based on aggravation of the initial injury was not claimed. The Appeals Panel reversed the hearing officer' determination that standing constitutes a repetitive trauma injury, in that the evidence and testimony clearly indicated the original wound had gotten better and worse, depending on the circumstances, but had never healed and there was no evidence that anything other than the original ankle wound was involved. Appeal No. 92518, although distinguishable on the facts from the instant case, presents some analogies.

In Appeal No. 92463, as previously mentioned, the employee originally injured her knee, had arthoscopic surgery, testified the pain never entirely went away, and returned to work, even though she did not feel 100% recovered. As in the instant case, the employee in Appeal No. 92463 testified her work was more strenuous than before her injury. Shortly after returning to work, the employee had renewed pain and swelling. The Appeals Panel affirmed the hearing officer's determination that the employee had not sustained a new injury. There are some distinguishing facts in Appeal No. 92463 from the instant case but, as cited previously, that case stands for the propositions that factual determinations of whether the injury is an aggravation or a continuation of an old injury are within the province of the hearing officer and that a return to work, particularly where claimant states she is not 100%, does not necessarily mean that subsequent pain or medical problems and related disability, are automatically an aggravation or a new injury.

After carefully reviewing the record we find there is sufficient evidence to support the

decision of the hearing officer and that his decision was consistent with the law. The decision is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge